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No. 95-____

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In The Supreme Court of the United States

October Term, 1995

International Alliance of Theatrical and Stage Employees and Moving Picture Machine Operators, AFL-CIO,

Petitioner,

v.

Compact Video Services, Inc.; Compact Video Group, Inc.; Meridian Studios; Image Transform, Inc.; and John Donlon,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly applied the statutory language and underlying policy in concluding that Respondent's employees did not suffer an "employment loss" under the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101 *et seq.*, where Respondent, which allegedly sold its business, told them they would no longer be employed once the transaction closes, encouraged them to apply with the "new" employer, and where the successor employer offered them employment at substantially inferior terms and conditions of employment.

2. Whether the Ninth Circuit was correct in its conclusion that Respondent proved that it had qualified under an alleged "sales" exemption to the WARN Act, despite Respondent's failure to cooperate in discovery, or submit competent evidence that a qualifying sale had taken place.

3. Whether the Ninth Circuit was correct in concluding that comments to the regulations exempting "sale of assets" promulgated by the Department of Labor pertinent to this matter are consistent with the language and intent of the WARN Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
GROUNDS FOR JURISDICTION	1
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	2
A. Course of Proceedings Below	2
B. Facts Relevant to the Issues Presented in this Petition	3
ARGUMENT	7
I. THE COURTS BELOW ERRED WHEN THEY DETERMINED THAT THE COMPACT EMPLOYEES SUFFERED NO "EMPLOYMENT LOSS" AS DEFINED BY THE WARN ACT	8
A. Defining a "WARN" Act Termination	8
B. The Employees Were Not "Transferred"	9
C. The Fundamental Purposes of WARN Are Effectuated by This Suit	13
D. The Department of Labor's Comments to the WARN Regulations Are Not Controlling	15
E. Given the State of Discovery, the Courts Below Committed Reversible Error in Denying Plaintiff's F.R.C.P. 56(f) Application, Because the Sales Documents Requested by Plaintiff Were Critical to a Determination of the Validity of Defendant's Claims That the WARN Act Was Not Triggered Because a Sale Occurred	16
CONCLUSION	18

TABLE OF AUTHORITIES

Cases Page

Auto Mechanics Local 701 v. Santa Fe Term. Serv., 830 F.Supp. 432 (N.D. Ill. 1993) 12
Babbitt v. Sweet Home Chapter of Communities, —— U.S. ——, 132 L.Ed.2d 597, 63 U.S.L.W. 4665 (1995) 15-16
Canteen Company, 317 NLRB No. 153 (June 30, 1995) 14
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 16
Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 16
City of Chicago v. Environmental Defense Fund, 511 U.S. ——, 128 L.Ed.2d 302 (1994) 16
Garrett v. City and County of San Francisco, 818 F.2d 1515 (9th Cir. 1987) 16
Headrick v. Rockwell Int'l Corp., 24 F.3d 1272 (10th Cir. 1994) 7, 12, 14, 15
Jones v. Kayser-Roth Hosiery Inc., 6 IER Cases 732 (E.D. Tenn. 1990) 13
Martin v. AMR Services Corp., 877 F.Supp. 108 (E.D.N.Y. 1995) 10, 12, 15
Moore v. Warehouse Club, 992 F.2d 27 (3d Cir. 1993) 12
Sames v. Gable, 732 F.2d 49 (3d Cir. 1984) 16
United Paperworkers Local 340 v. Specialty Paperboard, Inc., 999 F.2d 51 (2d Cir. 1993) 12
United Steelworkers v. North Star Steel, 5 F.3d 39 (3d Cir. 1993); *cert. den.*, 127 L.Ed.2d 380 (1994) 12
Visa International Service Association v. Bankcard Holders of America, 784 F.2d 1472 (9th Cir. 1986) 16

Statutes & Rules

28 U.S.C. § 1254(1) 1
29 U.S.C. §§ 2101 *et seq.* ..... *passim*
29 U.S.C. § 2101(a)(6) 8-9
29 U.S.C. § 2101(b) 12, 15
29 U.S.C. § 2101(b)(2) 11, 12
29 U.S.C. § 2103 ..... 9, 13

TABLE OF AUTHORITIES—Continued

	Page
29 U.S.C. § 2104(a) (5)	2
20 C.F.R. § 639.1	13
20 C.F.R. § 639.3(f)	14-15
20 C.F.R. § 639.5(b) (2)	14
20 C.F.R. § 639.6	15
Fed. R. Civ. P. 56(f)	2, 5, 16

IN THE

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OCTOBER TERM, 1995

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INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS, AFL-CIO,

Petitioner,

v.

COMPACT VIDEO SERVICES, INC.; COMPACT VIDEO GROUP, INC.; MERIDIAN STUDIOS; IMAGE TRANSFORM, INC.; and JOHN DONLON,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

GROUNDS FOR JURISDICTION

On March 23, 1995, the United States Court of Appeals for the Ninth Circuit issued its decision in this matter, with respect to which Petitioner seeks review in this Court. That decision is reported at 50 F.3d 1464. On June 2, 1995, the Ninth Circuit denied Petitioner's timely petition for rehearing with suggestion for rehearing en banc. Petitioner invokes 28 U.S.C. § 1254(1) as the basis upon which it seeks review of the Ninth Circuit's ruling by writ of certiorari.

STATUTES AND REGULATIONS

The Workers Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. §§ 2101 et seq. (appendix), 20 C.F.R. §§ 639 ff (appendix),

Rule 56(f) of the Federal Rules of Civil Procedure:

> (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

This action arises out of the Respondent's failure, pursuant to Section 5(a)(5) of WARN, 29 U.S.C. § 2104 (a)(5), to notify its employees at least 60 days before an alleged sale of its assets that their employment would be terminated because of the sale. The Employer, Compact Video Services, Inc., defends its failure to provide notice on the ground that the Act includes an exemption for the sale of a company, and therefore no notice was required under the Act. Original federal jurisdiction was invoked in the federal district court in this matter pursuant to 29 U.S.C. § 2104(a)(5).

A. Course of Proceedings Below

The Union filed its civil suit against the Employer on August 11, 1993. [App. 4a]. The Union sought an ex parte expedited discovery order on September 2, 1993, which was denied. The Employer filed its answer on September 3, 1993 and filed a summary judgment motion on September 13, 1993. [App. 4a]. The district court granted that motion at a hearing held on October 18, 1993, and issued a written order granting the motion on October 22, 1993.

The Ninth Circuit Court of Appeals issued its 2-1 decision affirming the district court on March 23, 1995. The Court of Appeals denied Petitioner's request for rehearing and suggestion for rehearing en banc on June 2, 1995.

B. Facts Relevant to the Issues Presented in this Petition

The Union has represented employees who, at least prior to August 5, 1993, worked for the Employer for many years. The Union has a collective bargaining agreement ("CBA") with Respondent Compact Video Services, Inc. ("Compact") that runs from August 1, 1992 through July 31, 1996. The CBA provides for a health plan requiring no employee premium contribution or co-payment, protection through grievance and arbitration procedures against unjust discharge, a pension plan, dental plan, and substantial wage scales. [App. 3a-4a].

The Union's first inkling that a change affecting corporate status was in the offing came when it became aware of an ad in the Hollywood Reporter, an entertainment industry daily publication, offering employment at a company "now forming" pending acquisition of the assets of Compact-related companies. [App. 3a]. On July 29, 1993, the Union's International Representative wrote Compact's president, John Donlon, asking him to verify the fact of the sale, and requesting bargaining and information relating to the sale. [App. 3a].

On Friday, July 30, 1993, Compact's employees received their first notice from their employers of the alleged sale of assets. [App. 3a]. Donlon wrote a letter to the company's employees telling them that the sale was expected to close the week of August 2, 1993, and that *"(a)fter the sale closes, you will no longer be employed by the Compact companies."* [App. 3a]. Donlon "encourage(d)" the employees to apply to the buyer, ATS Acquisition Corp., Inc. ("ATS") for employment. Also on July 30, 1993, Robert Walston, the buyer's Chairman and CEO, wrote a letter to the employees stating that:

> Many of you may have seen our "Help Wanted" notices in trade publications. However, we have not made any final decisions as to personnel and staffing. I am hopeful that you will apply for employment with our new company . . . If you do not apply, we will assume that you do not want to be considered for employment . . . After we determine our personnel needs, we will issue written offers to individuals selected for employment. These offers will set forth the new terms and conditions of employment at ATS . . . *We have worked on this transaction for many months . . .*

[App. 12a-13a]. (emphasis added).

Those who were hired by ATS suffered deep cuts in their wages, benefits and other terms of employment. Based on the incomplete information the Union had been able to gather at the time of summary judgment (without the cooperation of the Employer), of approximately 105 Union members hired by the buyer, 73 took pay cuts. [App. 3a]. Of all non-management employees hired by the buyer, the cuts were 5-19% for 37 people, 20-25% for 31 people, 30-33% for 19 people, and 50% or more for two people. All the buyer's employees represented by the Union are presently required to make health co-payments, and only a handful have retained their Union pension plan. All the rest have no pension plan. The buyer has also taken the position that its employees are now "at will," and further, that the Union now only represents a handful of them, not including those formerly employed at Compact Video Services, Inc. The buyer's employee handbook also calls for a new 180-day probationary period for all employees. Thus, most of the buyer's employees have had their economic terms substantially impaired, and their basic job protections (arbitration, progressive discipline, union representation) eviscerated. [App. 3a-4a].

On September 3, 1993, the Union served upon the Employer's counsel and John Donlon personally a notice

of deposition, supbpoena duces tecum, and request for production of documents. [App. 4a]. Included among the documents requested by subpoena and request for production were those related to the sales transaction, financial statements, evidence of the existence of a reserve fund, accountings for the sale proceeds, and a listing of assets involved in the sale. Though Donlon did appear for his deposition on September 16, 1993, the Employer refused to produce a single document, and Donlon claimed that neither he nor anyone in management at Compact Video were involved in the negotiations over the alleged sale.

On September 13, 1993 Respondents filed a motion for summary judgment, primarily relying on an argument that the alleged sale of Compact Video to ATS, coupled with the hiring of most of the incumbent employees by ATS, relieved Compact of its WARN notice obligations. To demonstrate the alleged fact of the sale, Defendants submitted only the declaration of Chief Financial Officer John Sabin [App. 4a]. Mr. Sabin's representation that a sale had taken place was unaccompanied by any supporting documents.

The IATSE opposed Defendants' motion on the grounds (*inter alia*) that WARN did not contain an exemption for situations where a sale of a business has taken place and the employees are given neither notice nor an assurance of future employment at comparable terms.[1] The

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[1] In addition, the Union contended that Defendants had not adequately shown a sale had indeed taken place, in light of a) Mr. Donlon's deposition testimony that no one in Compact management (which would include Sabin) had participated in the negotiations for the transaction, and b) the lack of corroborative documents. The IATSE filed evidentiary objections to Mr. Sabin's competence to declare that a sale had occurred, and listed as one material fact in dispute for summary judgment purposes the issue of whether a sale had occurred at all. Consistent with that position, the IATSE sought relief from the motion pursuant to F.R. Civ. P. 56(f).

Union took issue with the Respondent's view that somehow the buyer's conduct relieved it, the seller, of its WARN obligations, and protested that the result sought and obtained by Compact inflicted injury upon the terminated employees in precisely the manner sought to be shielded by WARN. IATSE appealed the district court's grant of summary judgment and denial of its request for relief under Rule 56(f).

The Ninth Circuit affirmed, in a decision drawing a dissent from Judge Ferguson. The panel majority concluded that most of the Compact employees had been "transferred" or "shifted" to ATS, that the sale was "not a WARN event", and that the seller was relieved of notice responsibility. Judge Ferguson, in dissent, took issue with the conclusion that the transaction merely resulted in an employee "transfer", noting that in doing so "the majority ignore the plain language of Donlon's letter (to the employees) . . ." and that of ATS' CEO, neither of which assured the employees of continued employment. Judge Ferguson aptly observed that "ATS acted no differently than any other company seeking employees on an open market", and that "(a)ll 314 of Compact's employees suffered an employment loss when they were specifically terminated by Compact on August 4, 1993 . . . Those Compact employees subsequently hired by ATS were not 'retained', but were hired, just as they might have been hired by any company then accepting applications for employment." Judge Ferguson thus concluded that "(a)s a result of Compact's unannounced asset sale to ATS, Compact's employees were faced with the very situation that WARN was enacted to prevent. On only a few days notice, they learned that their employment was ended. The new jobs offered by ATS had very different wage and benefit compensation and were structured not as salaried, but as at-will employment . . . Holding, as the majority does, that post-termination employment such as that offered by ATS relieves the seller of WARN

liability eviscerates the protections against unprecipitated termination which WARN was enacted to guarantee."

ARGUMENT

The IATSE respectfully urges that this petition be granted because of the exceptional importance and likely recurrence of the issues presented. Because of the frequency with which capital changes hands in this country, jeopardizing employees' careers in precisely the manner foreseen, and sought to be ameliorated, by the authors of the WARN Act, this Court should grant review to determine when WARN's protections govern in such circumstances.

The WARN Act was intended to introduce to large American workplaces, and their surrounding communities, the unremarkable concept of notice to be given to employees facing the uncertainty and disruption attendant to collective loss of employment. The Ninth Circuit has taken the arguably non-WARN distinct instance of actual seamless, innocuous employee transfer from one (selling) employer to another (buying) employer, see *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272 (10th Cir. 1994), and has incongruently grafted it onto the facts of this case, a paradigm of upheaval, wherein the employees were briskly and roughly shown the door by the selling employer and were not given assurances of prospective employment by anyone, where there is no evidence that the buyer had any obligation to hire any predecessor employees, and where the buyer unilaterally imposed vastly inferior terms of employment on the employees.

The employees in this case were treated in precisely the way Congress, in enacting the WARN Act, disapproved: the seller knew of the pendency of the transaction for "many months", was apparently planning during that period to end its relationship with its employees, provided no assurances to them that they would be hired by the buyer, and tendered them one weekend's notice to

apply to the future owner of the business. The employees were therefore deprived of the minimal protection that WARN, and humane business practice, require: the time to adjust, retrain, and seriously and constructively assess the situation before making a major career decision. By the same token, the employer unilaterally negated the policy choice that Congress saw fit to make in these circumstances, shifting back to the employees unbuffered by the decency of a temporal respite, the difficulties and dislocation inherent in any sudden, unanticipated substantive change in employment circumstances, which could readily, and with minimal cost, have been avoided by the provision of notice under WARN.

I. THE COURTS BELOW ERRED WHEN THEY DETERMINED THAT THE COMPACT EMPLOYEES SUFFERED NO "EMPLOYMENT LOSS" AS DEFINED BY THE WARN ACT.

A. Defining a "WARN" Act Termination.

The key to understanding this case, and the point where the courts below erred, is in grasping the fact that the employees *were terminated* by Compact. Just days before the sale, the Employer's SEO Donlon sent a letter to the employees stating:

> *After the sale closes, you will no longer be employed by the Compact companies.* Many of you will receive employment offers from ATS Acquisition Corp. or its subsidiary companies. If you accept these offers, you will be employed by ATS Acquisition Corp. or its named subsidiary after the sale. I encourage each of you to apply for employment, as I have, with ATS Acquisition Corp. ATS Acquisition Corp. is actively considering its staffing needs and will be sending out offers of employment shortly.

[App. 12a]. (emphasis added).

An "employment loss" under WARN is defined as:

> (A) *an employment termination, other than a discharge for cause, voluntary departure, retirement,*

> (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period.

29 U.S.C. § 2101(a)(6) (emphasis added). The Compact employees qualify under subparagraph (A). This cocnlusion is consistent with the Department of Labor's comment to the above definition, that the word "termination" is to have its "common sense meaning" as "the permanent cessation of the employment relationship." (App. 51a). That is precisely the message conveyed to Compact employees by both Donlon's and Walston's communiqués: The employees would have no further employment with Compact, and they were free to apply for work with the putative buyer, just as they were free to sign on with any other employer anywhere. Because the employees were terminated by the Employer, they were protected by the WARN Act.

The Act appropriately says nothing about relieving non-compliant employers fortunate enough to have terminated employees who quickly find employment elsewhere. By the same token, it expressly provides for "exemptions" (§ 2103), defines circumstances in which the notification period may be reduced (§ 2102(h)), and those in which a reduction in liability is appropriate (§ 2104 (a)(4)). In the presence of express exemptions and limitations on the scope and application of the Act, it must be inferred that where no exception is delineated, none may be read into the statute, by either an administrative agency, or the judiciary. The courts below did erroneously read that additional exemption into the law, providing an escape hatch for employers that Congress did not intend, and hence, improperly reintroducing employee vulnerability to employment disruption that Congress intended to cushion.

B. The Employees Were Not "Transferred".

Failing to recognize the distinction between a true, and by its terms necessarily limited, definition of employee

"transfer", and a termination resulting in an employment loss, the courts below diminished WARN beyond recognition, in a manner qualitatively different than courts have done in any other case, and in malevolent neglect of the harsh economic and employment realities extant in this case. The majority of the panel concluded that the former employees of Compact—denied notice, denied job security, denied equivalent employment terms—were nevertheless "transferred" or "shifted" from their former employer to ATS, implying by use of that terminology that Compact had managed somehow not to "terminate" its employees, thus avoiding WARN liability. This unprecedented conclusion, if permitted to stand, would expose employees in this case and in the future to the very "financial and psychological blows" inflicted by mass terminations that WARN was enacted to remedy (see, *Martin v. AMR Services Corp.*, 877 F.Supp. 108, 113 (E.D.N.Y. 1995)), is not supported by the evidentiary record, finds no basis in the statute, and thus must be corrected by this Court to avoid subversion of a Congressional mandate.

The majority failed to recognize that the drastic cuts in the former Compact employees' wages, benefits and other terms and conditions of employment, whether or not they in and of themselves constitute an employment loss, at a minimum tend to show that there was not a smooth "transfer" from one job to another, as the use of the term in this context necessarily implies. As Judge Ferguson put it, "(f)inding a new job on the day after your prior employment ends . . . is not synonymous with being 'retained' in your employment." Indeed, the plain fact that the majority did not insist on the existence of any pre-termination assurance of equivalent employment by the buyer as an absolute minimum requirement before releasing Compact from liability reveals the court's reading of the statute as a shredding of the "safety net" WARN was meant to provide. If this decision is allowed to stand, the federal courts will be following terminated employees on

their individual job searches, and the fortunate employers will be those whose employees do find work within some unknown period of time, while the unfortunate employers will be those with employees who are not so lucky, or enterprising. That is not the regime that Congress intended for WARN; nor is it required or reasonably construed from the language of the statute.

The fact that ATS felt free to abrogate the preexisting collective bargaining agreement, set initial terms unilaterally, and repudiate union representation, militates against characterization of what occurred in this case as a "transfer". ATS may well have acted unlawfully; that will be decided in other pending proceedings. But ATS' actions to set itself apart from Compact as an employer, including its "free market" approach to hiring former Compact employees, and its willingness to (harshly) treat the employees as if they had not been "transferred", but rather as if they were starting from scratch, collapses the majority's house of cards, built on the premise of the "transfer" eliminating the application of WARN.

The actions taken by both Compact and ATS suggest a termination and new hire sequence, and certainly not a "transfer" as that term is defined and applied under WARN (see 29 U.S.C. § 2101(b)(2)): Compact employees were terminated by their employer, and "encouraged" to apply for employment with ATS; the president of Compact told his employees that as of the close of the transaction, they would no longer be employed by the Compact entities; the employees filled out applications to work for ATS, and received no advance assurances that they would be offered employment by the "new" company; ATS' CEO warned the employees that the company was assessing its personnel needs, and had placed a "help wanted" ad in trade publications to attract recruits from outside the company.

Where employees are terminated—as opposed to laid off—the WARN consequences are immediately operative.

United Paperworkers Local 340 v. Specialty Paperboard, Inc., 999 F.2d 51, 52 (2d Cir. 1993); *Auto Mechanics Local 701 v. Santa Fe Term. Serv.*, 830 F.Supp. 432, 434 (N.D. Ill. 1993); Cf. *United Steelworkers v. North Star Steel*, 5 F.3d 39, 43 (3d Cir. 1993), *cert. den.*, 127 L.Ed.2d 380 (1994). Moreover, a "transfer" under WARN which relieves an employer of its notice obligation refers only to a job offer by the *terminating* employer to the employee for another position within the same company. See 29 U.S.C. § 2101(b)(2); *Moore v. Warehouse Club*, 992 F.2d 27, 29-30 (3d Cir. 1993); *Martin v. AMR Services Corp., supra*, 877 F.Supp. at 114-115. Therefore, where an employer has terminated its employees without providing WARN notice, and has no valid statutory defense, it does not matter when, or if, the terminated employees accept employment with *another* employer within the 60-day remedy period.[2] See footnote 4 *infra*.

The majority opinion never addresses the basic issue of how the language of Section 2101(b) of WARN relieves an employer like Compact, in the event of a sales transaction—if indeed, that is what occurred here—from the remedial requirements of the Act. Section 2101(b) requires the seller (Compact) to provide notice up to and including the effective date of the sale. The last sen-

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[2] Instead of grappling with that fundamental issue, the majority relied on the inapposite *Headrick*, case, *supra*, in which the Tenth Circuit really was confronted with a "transfer" of employees from a buyer to a seller, where the successor had agreed well in advance of the transaction to accept the predecessor's employees, where there was no *termination* notice to employees, and where the employees did in fact receive the requisite notice of the change in management. Over two months before the changeover was to occur, the successor company wrote to all employees "indicating that the (new) company would assume management of the plant effective the first of the year and *assuring them that (the new company) would retain all employees under the same terms and conditions they enjoyed with Rockwell.*" 24 F.3d at 1274.

tence of the subsection, upon which the majority apparently relies, shifts "employee" status from seller to buyer on the date of sale. It says nothing about what kind of transactions or circumstances are non-WARN events, as do other provisions of the Act (e.g., Section 2103, entitled "Exemptions").

C. The Fundamental Purpose of WARN Are Effectuated by This Suit.

The purpose of WARN is to afford:

> . . . protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market.

Jones v. Kayser-Roth Hosiery Inc., 6 IER Cases 732, 737 (E.D. Tenn. 1990) (and cases cited therein); 20 C.F.R. § 639.1. Even as the WARN Act's provisions were amended in the give and take of the legislative process, it necessarily remained a statute designed to protect workers' interests in an increasingly fluid, volatile business climate, wherein employers, focusing on the bottom line of a transaction or business conditions generally, fail to take those interests into account. That fundamental, motivating principle underlying the legislation would be sacrificed under the interpretation of the majority below, because under the court's rendering of the statute, virtually any transaction in which a business changes hands and leaves the employees adrift will now qualify for an exemption from WARN.

In this case, Compact's employees were denied virtually all of the transition time WARN provides, and were compelled to make immediate, profound career decisions on

just three days' notice. Though most of them did accept the coercive offer made to them by the buyer, the freedom of choice guaranteed them by the WARN Act was eviscerated. Even if the WARN Act does permit an exemption for some sales transactions (and the Union maintains that it does not), that exemption cannot apply in a case such as this where the employees are terminated by the employer and forced to apply for work anywhere they can, including with the buyer, and where the terms offered by the new employer are onerous, with virtually no time to consider their alternatives.[3] In a sale situation in which the terms of employment with the putative buyer are comparable to those with the seller and the buyer agrees in advance to offer employees such work (see, *Headrick, supra*), the WARN Act's basic purpose is effectuated, economic disclocation is minimized, and Congress could theoretically have more reasonably assumed that 60-day notice was not necessary for the affected employees to receive fair treatment. However, in a situation like the one at bar, where the employees are terminated and confronted with two patently unacceptable, unconscionable alternatives (i.e., be unemployed, or accept major economic and job security cutbacks), and are given three days to choose, WARN's salutary purposes have been repudiated.[4]

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[3] Indeed, the National Labor Relations Board recently concluded that terms offered by a successor that did not represent a deterioration in employment terms as profound as that experienced by the employees herein were nevertheless sufficient to transform employee rejection of such terms into constructive discharge. *Canteen Company*, 317 NLRB No. 153 (June 30, 1995); see also, 29 CFR § 639.5(b)(2): "An offer of reassignment to a different site of employment should not be deemed a 'transfer' if the new job constitutes a constructive discharge."

[4] Indeed, while the Department of Labor's comments to the regulations arguably provide some comfort for the employer's position, they also provide a basis to reject it at another juncture:

> ". . . a commenter suggested that where work is contracted out and the contractor hires the former employer's old workers

D. The Department of Labor's Comments to the WARN Regulations Are Not Controlling.

The statutory language Compact relies upon merely allocates the notice burden in the event of a sale; it does not eliminate it. Similarly, the regulations promulgated by the Department of Labor and relied upon by the majority do not (and cannot lawfully) create a new exception to, or gravely narrow the scope of, the Act. Thus, 20 C.F.R. § 639.6 observes that § 2101(b) of the Act "preserves the notice rights of the employees of a business that has been sold, but creates no other employment rights. Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss."

This regulation begs the question presented in this case: did the Compact employees experience a covered employment loss? It strains credulity to characterize the fate of the employees in this case as a mere "technical" termination, as could have been reasonably concluded about the employees in *Headrick* and *Martin*. Moreover, if the Department of Labor did mean to encompass and exclude this situation with the above-quoted regulation, it has necessarily overreached its authority, blasting by administrative fiat a gaping hole in the statute labelled "technical termination", to which the courts need not extend deference. See, *Babbitt v. Sweet Home Chapter of Com-*

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to perform the contracted work, no notice should be required unless more than the threshold number of employees are not rehired. *These definitions cannot be squared with the definition of employment loss or with the statutory structure, which focuses on the effects of employment losses on groups of workers. WARN requires notice to workers who lose their jobs with a particular employer, whether or not other workers have gained other jobs and whether or not other employers may hire those workers."*

Comments to § 639.3(f), p. 55a.

munities, —— U.S. ——, 132 L.Ed.2d 597, 63 U.S.L.W. 4665 (1995); *City of Chicago v. Environmental Defense Fund*, 511 U.S. ——, 128 L.Ed.2d 302, 312 (1994) (deference to agency interpretation rejected where it goes beyond the scope of whatever statutory ambiguity there may be); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984). As explained above, neither the statutory language, nor its underlying purpose, will bear the construction placed upon it as understood by the majority below.

E. Given the State of Discovery, the Courts Below Committed Reversible Error in Denying Plaintiff's F.R.C.P. 56(f) Application, Because the Sales Documents Requested by Plaintiff Were Critical to a Determination of the Validity of Defendant's Claims That the WARN Act Was Not Triggered Because a Sale Occurred.

This Court has recognized that a party opposing summary judgment should not be "railroaded" by such a motion before full discovery can be had. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 91 L.Ed.2d 265, 276 (1986).

Cases construing Rule 56(f) in the Ninth and other Circuits suggest that:

> the denial of a Rule 56(f) application is generally disfavored where the party opposing summary judgment makes (a) timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists. Summary denial is especially inappropriate where the material sought is also the subject of outstanding discovery requests.

Visa International Service Association v. Bankcard Holders of America, 784 F.2d 1472, 1475 (9th Cir. 1986); *see also, Garrett v. City and County of San Francisco*, 818 F.2d 1515 (9th Cir. 1987), and cases cited therein; *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984). That

is the case here. In fact, all of the necessary elements to grant the Union's application under Rule 56(f) are present in this case.

The Employer filed its dispositive motion just ten days after it answered the First Amended Complaint. [ER at 64]. The day after answering, the Employer served objections to each and every document request made by the Union, refusing to produce a single requested document. The Employer then sought summary judgment on the ground that the transaction involved was a "sale," and that WARN exempts such transactions from its notice requirements. But the Employer did not offer a single document to substantiate the occurrence or the appropriate characterization of the alleged transaction. Rather, the declarant, John Sabin, failed to explain his competence to make the representation; and one of his colleagues, current ATS President and former Compact CEO and President John Donlon, testified in his deposition that neither he or any other Compact employee (which includes Sabin) was involved in the "sale" negotiations. [App. 4a].

If Compact's "transfer" defense is to have any substance, it must be corroborated by more than the assertion of a person admittedly without firsthand knowledge of the nature of the transaction, and with no knowledge of the buyer's obligations (if any) toward the former employees of the seller. Compact refused to cooperate in the discovery of such matters, and the Courts below refused to compel it to do so. In light of the importance of the issues in this case as they apply to the enforcement of an important Congressional mandate, Petitioner respectfully urges this Court to disapprove this aspect of the rulings below, concomitant with its review of the substantive WARN issues addressed heretofore.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court to grant this petition for certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 93-56664

INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS, AFL-CIO,

Plaintiff-Appellant,

v.

COMPACT VIDEO SERVICES, INC.; COMPACT VIDEO GROUP, INC.; MERIDIAN STUDIOS; IMAGE TRANSFORM, INC.; and JOHN DONLON,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

Argued and Submitted Dec. 7, 1994
Decided March 23, 1995

Before: BROWNING, GOODWIN, and FERGUSON, Circuit Judges.

GOODWIN, Circuit Judge:

Legislation is enlisted from time to time in the chronic tension between labor and management, to the advantage of one side and to the disadvantage of the other. In this case we decide whether the Worker Adjustment and Re-

training Notification Act ("WARN"), 29 U.S.C. § 2101 *et seq.*, applies to this contest between a union and a selling corporation which tried to rid itself of the union.

The selling corporation sold its unionized business to a nonunion entity. The acquiring entity kept on nearly all of the old work force, though at slightly lower rates of pay and without the fringe benefits that had been called for in the collective bargaining agreement between the union and the selling corporation. A handful of workers either were not invited to remain with the new owner, or declined to do so.

Reserving its rights and remedies by instituting proceedings before the National Labor Relations Board, and judicial proceedings under relevant sections of the National Labor Relations Act, the union also commenced these WARN proceedings in the District Court to obtain for each former employee of the selling corporation sixty days salary and benefits, as penalty for the seller's failure to give the workers sixty days' advance notice of an "employment loss."

The District Court on summary judgment ruled that employees who find themselves transferred from the payroll of one company to the payroll of another as the result of a sale have not suffered a compensable "employment loss" under WARN, whatever may be the consequences of that scheme for purging a work force of its unionized character in appropriate proceedings before the NLRB, or under other provisions of labor law. Because the District Court correctly construed the applicable law, the summary judgment is affirmed.

Background

In July 1993, Compact Video Services, Inc., Compact Video Group, Inc., Meridian Studios, and Image Transform, Inc. ("Compact") owned a videotape post-produc-

tion business in Burbank, California. The business employed 314 people (the "Compact employees"). International Alliance ("The Union") represented about a third of them. By July, 1993, Compact was saddled with heavy corporate debt, and was looking for a way out. ATS Acquisition Corp., Inc. ("ATS"), a holding company, agreed to renegotiate and restructure Compact's debt with Compact's lenders, and release Compact from responsibility for its debt. In return, ATS would acquire Compact's Burbank videotape post-production business.

Sometime in late July, the Union learned that the Hollywood Reporter was advertising employment openings at a company to be formed pending acquisition of the assets of Compact. On July 29, the Union wrote to Compact's president, seeking information about the sale. The following day, July 30, Compact's CEO, John Donlon, sent a letter to the Compact employees informing them that its business was going to be sold, and that "after the sale closes, you will no longer be employed by the Compact companies." Donlon encouraged the Compact employees to apply with ATS for employment. That same day, Robert Watson, ATS's Chairman and CEO, wrote a letter to the Compact employees encouraging them to apply for employment with ATS.

The sale closed the week of August 2, 1993. Prior to the sale's closing, ATS notified 309 of the 314 Compact employees that it would keep them on board. Three Compact employees declined the invitation to work under the new management. Another 306 Compact employees accepted employment with ATS. They became ATS employees immediately upon the sale of Compact to ATS, without missing a day's work.

Many of the new ATS employees were paid less than before the sale, and were afforded fewer "fringe" benefits. The Union estimates that of approximately 105 Union members hired by ATS, seventy-three took pay cuts. All

employees represented by the Union are now required by ATS to make health plan co-payments, and many of them lost Union pension plans. ATS apparently does not recognize the Union's representation of the former employees of Compact Video Services, Inc. ATS considers its employees to be "at will," and subjects them to a 180 day "probationary period" (which period, presumably, has since expired for all former Compact employees).

On August 11, 1993, the Union filed this action against Compact, seeking damages under WARN because Compact did not give its employees 60 days advance notice of their "mass layoff." In September 1993, the Union filed a second action against Compact and ATS, alleging violations of federal labor law and collective bargaining agreements.

The Union demanded discovery of the Compact-ATS sales agreement. Compact cried "fishing expedition!" The Union's *ex parte* motion to discover the agreement was denied. On September 13, 1993, Compact moved for summary judgment. In support of its motion Compact submitted the declaration of its Chief Financial Officer, John Sabin. Sabin stated that he had personal knowledge that a sale had taken place. It was undisputed that only five Compact employees were not retained by ATS.

The Union opposed summary judgment on the ground that Compact had not adequately shown that a sale had taken place, because Compact CEO Donlon had stated in a deposition that no one in Compact management (including Sabin) had participated in the negotiations for the transaction, and because Compact had not produced the sales agreement. The Union also moved for a continuance under Federal Rule of Civil Procedure 56(f), seeking leave to discover more about the Compact-ATS sales agreement.

The District Court denied the Union's Rule 56(f) motion, and granted summary judgment to Compact. The

District Court reasoned that there were no triable issues of material fact, and that additional discovery could not possibly create any, in light of the court's conclusion that fewer than fifty employees had suffered an "employment loss" as defined in WARN.[1]

Standard of Review

We interpret the provisions of WARN *de novo*. We review the District Court's denial of discovery pursuant to Rule 56(f) for abuse of discretion. *Qualls v. Blue Cross of California*, 22 F.3d 839, 844 (9th Cir.1994). There can be no abuse of discretion where the movant failed to show how allowing additional discovery would have precluded summary judgment. *Id.*

WARN Applied

WARN requires that an employer give 60 days advance warning before any "plant closing" or "mass layoff." A "plant closing" is a shutdown of a single site of employment that causes an "employment loss for fifty or more employees during a thirty-day period. 29 U.S.C. § 2101(a)(2). A "mass layoff" is any other "employment loss" within any thirty-day period for either (a) fifty to 499 full-time employees, if the number laid off equals thirty-three percent of the work force; or (b) 500 full-time employees. 29 U.S.C. § 2101(a)(3). Thus, when fewer than fifty full-time employees suffer an "employment loss," WARN notice is not required.

"Employment loss" is defined as

> (A) An employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period[.]

---

[1] In subsequent proceedings before the NLRB, Compact finally did fork over a copy of the sales agreement to the Union.

29 U.S.C. § 2101(a)(6). The Department of Labor ("DOL") added to its final regulations under the Act a comment explaining that the word "termination" is "to have [its] common sense meaning[]" as "the permanent cessation of the employment relationship . . . ." 54 Fed. Reg. 16,047 (1989).

The Union argues that this case turns on the statement in Donlon's letter: "after the sale closes, you will no longer be employed by the Compact companies." According to the Union, this statement shows that Compact "terminated" its employees, and was therefore under a statutory duty to give them 60 days advance warning. The Union denies that workers shifted from one employer to another as a result of a sale are excepted from the definition of "employment loss." The law, however, is entirely the other way. The statutory language, the legislative history, the regulations, and a persuasive Tenth Circuit opinion confirm the existence of a "sales exception" to WARN.

Section 2101(b) reads:

> Exclusions from definition of employment loss
>
> (1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of

> the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

The accompanying regulation explains:

> This provision preserves the notice rights of the employees of a business that has been sold, but creates no other employment rights. *Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss.*

20 C.F.R. § 639.6 (emphasis added).

As a threshold matter, we address our dissenting colleague's contention that Section 2101(b) does not apply to this case, because we are looking at a sale of assets, not a sale of a business. Compact was a parent corporation, the asset of which was the Burbank videotape post-production business. When Compact sold its assets to ATS, it sold that business. On the facts of this case, the distinction drawn by the dissent is quite without foundation. We conclude that Section 2101(b) applies.

In *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272 (10th Cir.1994), former Rockwell employees sued Rockwell under WARN, alleging that Rockwell's transfer of control to EG & G amounted to an "employment loss" requiring notice. The Rockwell employees argued that they were "technically" terminated when they ceased to be Rockwell employees, even though they were immediately rehired by EG & G upon the effective date of sale and never "faced the need to readjust, retrain, find new work or seek unemployment compensation. . . ." *Id.* at 1280 (internal quotations omitted). The Tenth Circuit was not persuaded by this argument. *Headrick* explained that a sale is not a WARN event: "the obligation to warn employees in the event of a closure or mass layoff skips

from seller to buyer, never triggered by the sale. Any argument to the contrary is simply foreclosed by the statute itself." *Id.*

But might a sale be a WARN event if the buyer modifies the terms and conditions of employment after the sale? More to the point, might a sale be a WARN event if the buyer *impairs* the terms and conditions of employment after the sale? (After all, had ATS *increased* the salaries and benefits of the Compact employees, making them better off than before, no sentient attorney would clamor to hold Compact liable for the worker's "termination.") In *Headrick*, the Rockwell employees were retained by EG & G under the same terms and conditions they enjoyed with Rockwell, and EG & G assumed and honored the existing collective bargaining agreement. *Id.* at 1274. The Compact employees were not so fortunate. Senator Hatch, who worded the sales exception to WARN, commented that "[i]t would seem fairly obvious that *if the business continues on as before with no significant changes of any kind*, that there would be no need to go through the formal notification process." 134 Cong. Rec. 16,026 (1988) (emphasis added). This comment might be read as the thinnest support for rejecting the application of the sales exception to the facts of this case. Predictably, that's the way the union reads it.

WARN's sales exception allocates notice responsibility to the party who actually makes the decision that creates an "employment loss," but "creates no other employment rights." *See* 20 C.F.R. § 639.6. As we see it, the fact that the Compact employees were taken on by ATS with reduced salary and benefits might be relevant if the question were whether *ATS* caused them to suffer a covered "employment loss"—and we next shall consider whether these wage and benefits reductions constitute an "employment loss." But the question now is whether the sales exception relieves the *seller* of WARN notice obliga-

tions, and we think that the conduct of the *buyer* is irrelevant to that. An "employment loss" occurring *before* the sale is effective is the seller's responsibility. An "employment loss" occurring *after* the sale is effective is the buyer's responsibility. The sale itself does not implicate WARN at all. *Headrick*, 24 F.3d at 1281. A sale is still a sale, and the seller is relieved of notice responsibility, even though the buyer causes the seller's former employees to suffer an employment loss.

The employment terms to which the Compact employees object went into effect after Compact sold its business to ATS. Contrary to the dissent's intimation, nothing in WARN requires a seller to insist upon a contract term guaranteeing its employees continued employment with the buyer. Had ATS simply decided not to hire any of the Compact employees at all, ATS, not Compact, would have had the responsibility for giving WARN notice.[2]

---

[2] That's the Department of Labor's view, and we share it:

> WARN creates an absolute division of responsibility for giving notice between a buyer and a seller of a business; the seller is liable to give notice of covered actions which occur up to and including the date (time) of sale and the buyer is responsible thereafter.
>
> . . . .
>
> One commenter suggested that the regulations make it clear that if the employees of a business that has been sold are not rehired by the buyer, the responsibility for giving notice is on the seller. *The Department believes that such an allocation of responsibility is directly contrary to the statutory language and intent. If a plant closing occurred as a result of the buyer's decision not to rehire the seller's workers, and the closing occurred after the effective time of the sale, the buyer is responsible for giving notice. This view is consistent with the statutory provision that the employees of the seller become the employees of the buyer immediately after the sale . . . and with the reality of allocating responsibility for notice to the party to the transaction that actually makes the decision to order the plant closing or mass layoff. . . .*

54 Fed.Reg. 16,052 (1989) (emphasis added).

So it is when the buyer, rather than dismissing the seller's employees outright, decides to keep them on at the job, but on less favorable terms.

Sale a Sham?

If there was a sale, it was not a WARN event. With that point established we would end our discussion, were it not for the Union's suggestion that the Compact-ATS sale was a "sham," that ATS is Compact's "alter ego," and therefore that Compact is still the employer. If there never was any sale, then talk of a "sales exception" is, of course, beside the point. The Union suggests that there was something fishy about the sale, we think, in order to bolster its argument that it should have been permitted to discover the sales agreement. But we are convinced that further discovery was unnecessary, for if there was no sale then Compact could be liable under WARN only if modification of the Compact employees' salaries and benefits is a WARN event, and the plain language of the statute reveals that it is not.

Only an "employment loss" is a WARN event. 29 U.S.C. §§ 2101(a)(2), (a)(3), 2102. An "employment loss" is carefully confined to three instances: "[A]n employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent of each month during any 6-month period[.]" 29 U.S.C. § 2101(a)(6). The Union seems to reason along these lines: a pay and benefits cut is a "loss"; it is a loss that affects one's employment; therefore, it is an "employment loss." It is the syllogism that must fit the statute, not vice-versa. The facts of this case fit neither (A), (B), nor (C). That Congress applied WARN notice requirements to reductions in work hours, in (C), persuades us that WARN does not apply to any other modifications of the terms of employment. We understand that WARN was enacted for employees' protection, but we cannot rewrite it to require employers to

give 60 days notice for every wage adjustment and modification of employee handbooks. Employees must look to other sources of law, for example federal labor laws, ERISA, or common law contract principles, to remedy an improper modification of the terms of their employment.

Conclusion

A sale of a business is not a WARN event. The modification of employee salaries and benefits is not a WARN event, either. Since the undisputed facts show that only five Compact employees suffered an "employment loss," summary judgment was proper and the District Court did not abuse its discretion by denying the Union's motion under Rule 56(f).

AFFIRMED.

FERGUSON, Circuit Judge, dissenting:

I dissent for the reason that the majority opinion is mistaken in its major premise. The majority rely exclusively on the premise that this is a case in which there was a sale of a business. The undisputed fact that the majority completely ignore is that this case is not about a sale of the business, but merely a sale of assets of the business. That fact is conclusively established by the record. What is unknown is whether the sale was of all the assets or just a part of them. The district court refused to order the agreement to be produced. The majority, like the district court, err in the conclusion that Compact Video Services' ("Compact's") employees were merely "transferred from the payroll of one company to another as the result of a sale" because their major premise, that the sale was a sale of the business, is wrong.

On July 30, 1993 Compact notified all 314 of its employees by letter that Compact was selling its assets to ATS Acquisition Corporation ("ATS") during the week of August 2, 1993. Compact's notice explained the impending termination of the current employer/employee relationship and imputed that future ATS hiring decisions were beyond the power or authority of Compact's management. The letter, from Compact CEO John Donlon, read:

> After the sale closes, you will no longer be employed by the Compact Companies . . .
>
> I encourage each of you to apply for employment, as I have, with ATS Acquisition Corp. ATS Acquisition Corp. is actively considering its staffing needs and will be sending out offers of employment shortly.

29 U.S.C. § 2101(b)(1) allocates the burden of notifying employees faced with a potential employment loss to the party which has made the decision that creates an "employment loss". 20 C.F.R. § 639.4. In assuming

that Compact's employees were transferred, the majority ignore the plain language of Donlon's letter and the plain meaning of an asset sale. An asset sale involves only a company's assets; the seller retains corporate liabilities such as the Worker Adjustment and Retraining Notification Act ("WARN") notification requirement. 29 U.S.C. § 2102(a).

Additional evidence of the fact that Compact's sale of assets did not include the transfer of any employer liabilities is ATS' letter to Compact's employees on July 30, 1993. ATS' letter notified Compact's employees that ATS was acquiring the assets of Compact, but made no offers of employment. ATS encouraged Compact employees to apply with ATS since it was currently reviewing its staffing needs. An August 2nd application deadline was announced:

> Many of you may have seen our recent "Help Wanted" notices in trade publications. However, we have not made any final decisions as to personnel and staffing. I am hopeful that you will apply for employment with our new company and I encourage you to submit an application no later than Monday, August 2, 1993, which is the application deadline. If you do not apply, we will assume that you do not want to be considered for employment . . . After we determine our personnel needs, we will issue written offers to individuals selected for employment at ATS.

Neither ATS nor Compact ever suggested to Compact's employees that the impending sale would involve the transfer of Compact employees to ATS employment. While both letters encouraged Compact employees to apply for jobs with ATS, both also implied that ATS hiring decisions were to be made on an ad hoc basis in response to ATS' perceived staffing needs for its new company and that no agreement had been reached between Compact and ATS providing for the automatic "transfer" of em-

ployees. No indication was given as to whether or not ATS would hire any of Compact's employees. ATS acted no differently than any other company seeking employees on the open market.

On August 3, ATS extended offers of employment to selected members of its applicant pool. In its offers, ATS made no mention of assuming Compact's responsibilities either as a business or as an employer. Applicants were given until the next day, the 4th, to respond; all offers were void after August 4. The sale of assets closed on August 5. Because of the constricted time frame of the ATS application process for former Compact employees, the majority is correct in noting that Compact employees who were accepted by ATS did not miss a day of work. Finding a new job on the day after your prior employment ends, however, is not synonymous with being "retained" in your employment.

Viewing the facts in the light most favorable to the Union, as summary judgment requires, Compact employees lost their jobs. In addition, the record raises a genuine issue of material fact which makes summary judgment inappropriate. Did the sale of assets encompass more than a traditional sale of assets and provide for the transfer of workers and corporate liability? The district court erroneously weighed the evidence before it when it concluded that the sale of assets agreement involved the sale of the business and so, only technical job losses. Absent the discovery of the sale of assets agreement between Compact and ATS, a genuine issue of material fact remains and it cannot be known whether the sale was a traditional sale of assets leaving Compact responsible for its corporate liabilities or a sale of the business as contemplated by WARN, 29 U.S.C. § 2101(b)(1).

WARN was enacted in order to ensure that employees faced with an impending employment loss have some time in which to pursue additional training for a new career or alternative employment opportunities. 20 C.F.R.

§ 639.1(a). WARN, therefore, requires an employer to provide 60 days notification prior to a mass layoff or closing which results in an "employment loss" for fifty or more employees. 29 U.S.C. §§ 2101(a)(3), 2102(a). WARN exempts the sale of a company from this notification requirement if the sale results in only "technical" job losses since such technical job losses do not pose any real threat to employees' livelihoods.

ATS' purchase of Compact's assets was not exempted by 29 U.S.C. § 2101(b)(1) because it resulted in substantial job losses. *See Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 778 F.Supp. 297, 314 (E.D.La. 1991), *aff'd in part and rev'd in part*, 15 F.3d 1275 (5th Cir.1994) (affirming the employer's violation of WARN, but reversing the calculation of damages). Compact's own Chief Financial Officer, John Sabin, admitted that Compact's sale to ATS was only a sale of assets. Nevertheless, the majority mischaracterizes ATS' hiring of Compact's employees as a "transfer". A sale of assets, however, involves only assets, not employees. Unlike the sale of a business itself, a sale of assets transfers a seller's liability only if one of the following four exceptions apply:

> (1) The purchasing corporation expressly or impliedly agrees to assume the liability;
>
> (2) The transaction amounts to a "de facto" consolidation or merger;
>
> (3) The purchasing corporation is merely a continuation of the selling corporation;
>
> (4) The transaction was fraudulently entered into in order to escape liability.

Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir.1990). The record is completely silent in establishing any of the four exemptions.

The majority sets a dangerous precedent by upholding the grant of summary judgment in this case. According

to the reasoning of the majority, a manufacturing plant can conclude an agreement to sell only its fleet of trucks. The sale can result in an employment loss for all 100 employees previously employed in the loading and driving of the trucks. Nevertheless, the seller, under the reasoning of the majority, will be exempted from WARN's notification requirement because the manufacturer who sold the trucks qualifies for WARN's sales exemption, 29 U.S.C. § 2101(b)(1). The majority fail to understand WARN's sale of a business exemption.

WARN defines "employment loss" as:

> (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period . . .

29 U.S.C. § 2101(a)(6). All 314 of Compact's employees suffered an employment loss when they were specifically terminated by Compact on August 4, 1993. As both Compact's and ATS' letters demonstrate, ATS' decisions to hire Compact employees were made on an ad hoc basis after the employees had been notified of their impending termination from Compact and had applied, as individuals, to ATS. Those Compact employees subsequently hired by ATS were not "retained", but were hired, just as they might have been hired by any company then accepting applications for employment.

As a result of Compact's unannounced asset sale to ATS, Compact's employees were faced with the very situation that WARN was enacted to prevent. On only a few days notice, they learned that their employment was ended. The new jobs offered by ATS had very different wage and benefit compensation and were structured not as salaried, but as at-will employment. The way the majority read WARN, Congress intended only to protect those employees who are unable to find any alternative

employment. WARN is not triggered by a specified length of employment loss, but by any employment loss. The sale of a business is exempt, but the sale of assets is not legally equivalent to the sale of a business. Holding, as the majority does, that post-termination employment such as that offered by ATS relieves the seller of WARN liability eviscerates the protections against unprecipitated termination which WARN was enacted to guarantee.

Compact and the majority rely on *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272 (10th Cir.1994), to support the conclusion that WARN obligations were not triggered by the asset sale. *Headrick*, however, is distinguishable. In *Headrick*, while the transaction involved a transfer of assets, the transferee explicitly agreed to assume the transferor's liabilities relative to the plant's operation, all employer's responsibilities, and did so with the expectation that the facility would be operated with the transferor's former employees. The transaction was similar to the sale of a business except for the fact that the transferor did not own the business. All the transferee had was a plant management contract with the government. It should be noted that the transaction in *Headrick* meets the first exception in *Louisiana-Pacific*, "the purchasing corporation expressly or impliedly agree[d] to assume the liability." *Louisiana-Pacific*, 909 F.2d at 1263. Here, there was no assumption by ATS of any employer responsibilities or any other obligations.

The district court erred by granting Compact's motion for summary judgment. In granting a motion for summary judgment a court is required to review the evidence in the light most favorable to the nonmoving party and determine that there exist no genuine issues of material fact. *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir.1994). The undisputed facts of this case show that the sale at issue is a sale of assets. A sale of assets is presumed not to involve a transfer of

employees; therefore, a genuine issue of material fact exists as to whether or not Compact's sales agreement made provisions for a transfer of Compact's employees. Reviewing the evidence in the light most favorable to the Union, Compact terminated the employment of all of its employees on the date that it sold its assets to ATS. The sales exemption of WARN is not applicable to this case and a grant of summary judgment is in error.

APPENDIX B

[Filed Jun. 2, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-56664

D.C. No. CV-93-04737-ER

INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS, AFL-CIO, *Plaintiff-Appellant,*

v.

COMPACT VIDEO SERVICES, INC.; COMPACT VIDEO GROUP, INC.; MERIDIAN STUDIOS; IMAGE TRANSFORM, INC.; and JOHN DONLON, *Defendants-Appellees.*

ORDER

Before: BROWNING, GOODWIN, and FERGUSON, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing. Judge Ferguson would grant the petition for rehearing. Judge Browning has voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends. Judge Ferguson recommends accepting the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

[Filed Oct. 22, 1993]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 93-4737 ER (Ex)

INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS, AFL-CIO on behalf of itself and its members,

Plaintiff,

vs.

COMPACT VIDEO SERVICES, INC., COMPACT VIDEO GROUP, INC., MERIDIAN STUDIOS, IMAGE TRANSFORM, INC. and JOHN DONLON,

Defendants.

JUDGMENT

This action came for hearing before this Court, on October 4, 1993, Honorable Edward Rafeedie, District Judge presiding, on a Motion for Summary Judgment, and the evidence presented having been fully considered, the issues having been duly heard and the decision having been duly entered.

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits and that Defendants Compact Video Services, Inc., Compact Video Group, Inc., Meridian Studios, Image Transform, Inc. and John Donlon recover their costs.

DATE: OCt. 22, 1993

/s/ Edward Rafeedie
HONORABLE EDWARD RAFEEDIE
United States District Judge

APPENDIX D

STATUTES AND REGULATIONS

CHAPTED 23—WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

§ 2101. Definitions; exclusions from definition of loss of employment

(a) Definitions.—As used in this chapter—

(1) the term "employer" means any business enterprise that employs—

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term "mass layoff" means a reduction in force which—

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for—

(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of Title 45;

(5) the term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b) of this section, the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss.—(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part

or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after th effective of the sale.

(2) Notwithstanding subsection (a)(6) of this section, an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the employer's business and, prior to the closing or layoff—

(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(Pub.L. 100-379, § 2, Aug. 4, 1988, 102 Stat. 890.)

§ 2102. Notice required before plant closings and mass layoffs

(a) Notice to employees, state dislocated worker units, and local governments.—An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [29 U.S.C.A. § 1651 et seq.]) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

(b) Reduction of notification period.—(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

(c) Extension of layoff period.—A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this chapter unless—

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable, that the extension beyond 6 months will be required.

(d) Determinations with respect to employment loss.—For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2101(a)(2) or (3) of this title but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.

(Pub.L. 100-379, § 3, Aug. 4, 1988, 102 Stat. 891.)

§ 2103. Exemptions

This chapter shall not apply to a plant closing or mass layoff if—

(1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking; or

(2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this chapter. Nothing in this chapter shall require an employer to serve written notice pursuant to section 2102(a) of this title when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act [29 U.S.C.A. § 151 et seq.]: *Provided,* That nothing in this chapter shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act. [29 U.S.C.A. § 151 et seq.]:

(Pub.L. 100-379, § 4, Aug. 4, 1988, 102 Stat. 892.)

§ 2104. Administration and enforcement of requirements

(a) Civil actions against employers.—(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

(A) back pay for each day of violation at a rate of compensation not less than the higher of—

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by—

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

(4) If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce

the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

(b) Exclusivity of remedies.—The remedies provided for in this section shall be the exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

(Pub.L. 100-379, § 5, Aug. 4, 1988, 102 Stat. 893.)

§ 2105. Procedures in addition to other rights of employees

The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any

period of notification required by contract or by any other statute.

(Pub.L. 100-379, § 6, Aug. 4, 1988, 102 Stat. 894.)

§ 2106. Procedures encouraged where not required

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 2102 of this title should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

(Pub.L. 100-379, § 7, Aug. 4, 1988, 102 Stat. 894.)

§ 2107. Authority to prescribe regulations

(a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this chapter. Such regulations shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for appropriate service of notice as required by this chapter.

(b) The mailing of notice to an employee's last known address or inclusion of notice in the employee's paycheck will be considered acceptable methods for fulfillment of the employer's obligation to give notice to each affected employee under this chapter.

(Pub.L. 100-379, § 8, Aug. 4, 1988, 102 Stat. 894.)

§ 2108. Effect on other laws

The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act [29 U.S.C.A. § 151 et seq.] or the Railway Labor Act [45 U.S.C.A. § 151 et seq.].

(Pub.L. 100-379, § 9, Aug. 4, 1988, 102 Stat. 894.)

§ 2109. Report on employment and international competitiveness

Two years after Aug. 4, 1988, the Comptroller General shall submit to the Committee on Small Business of both the House and Senate, the Committee on Labor and Human Resources, and the Committee on Education and Labor a report containing a detailed and objective analysis of the effect of this chapter on employers (especially small- and medium-sized businesses), the economy (international competitiveness), and employees (in terms of levels and conditions of employment). The Comptroller General shall assess both costs and benefits, including the effect on productivity, competitiveness, unemployment rates and compensation, and worker retraining and readjustment.

(Pub.L. 100-379, § 10, Aug. 4, 1988, 102 Stat. 894.)

PART 639—WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

§ 639.1 Purpose and scope.

(a) *Purpose of WARN.*

The Worker Adjustment and Retraining Notification Act (WARN or the Act) provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

(b) *Scope of these regulations.*

These regulations establish basic definitions and rules for giving notice, implementing the provisions of WARN. The Department's objective is to establish clear principles and broad guidelines which can be applied in specific circumstances. However, the Department recognizes that Federal rulemaking cannot address the multitude of industry and company-specific situations in which advance notice will be given.

(c) *Notice encouraged where not required.*

Section 7 of the Act states:

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 3 should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

(d) *WARN enforcement.*

Enforcement of WARN will be through the courts, as provided in § 5 of the statute. Employees, their representatives and units of local government may initiate civil actions against employers believed to be in violation of § 3 of the Act. The Department of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions on specific cases. The Department will provide assistance in understanding these regulations and may revise them from time to time as may be necessary.

(e) *Notice in ambiguous situations.*

It is civically desirable and it would appear to be good business practice for an employer to provide advance notice to its workers or unions, local government and the State when terminating a significant number of employees. In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN to business practices in the market economy that cannot be addressed in these regulations. It is therefore prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve disputes where notice has not been given. The Department encourages employers to give notice in all circumstances.

(f) *Coordination with job placement and retraining programs.*

The Department, through these regulations and through the Trade Adjustment Assistance Program (TAA) and Economic Dislocation and Worker Adjustment Assistance Act (EDWAA) regulations, encourages maximum coordination of the actions and activities of these programs to assure that the negative impact of dislocation on workers is lessened to the extent possible. By providing for notice to the State dislocated worker unit, WARN notice

begins the process of assisting workers who will be dislocated.

(g) *WARN not to supersede other laws and contracts.*

The provisions of WARN do not supersede any laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If such law or agreement provides for a longer notice period. WARN notice shall run concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights.

§ 639.2 What does WARN require?

WARN requires employers who are planning a plant closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. While the 60-day period is the minimum for advance notice, this provision is not intended to discourage employers from voluntarily providing longer periods of advance notice. Not all plant closings and layoffs are subject to the Act, and certain employment thresholds must be reached before the Act applies. WARN sets out specific exemptions, and provides for a reduction in the notification period in particular circumstances. Damages and civil penalties can be assessed against employers who violate the Act.

§ 639.3 Definitions.

(a) *Employer.* (1) The term "employer" means any business enterprise that employs—

(i) 100 or more employees, excluding part-time employees; or

(ii) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime.

Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An employee has a "reasonable expectation of recall" when he/she understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job. The term "employer" includes non-profit organizations of the requisite size. Regular Federal, State, local and federally recognized Indian tribal governments are not covered. However, the term "employer" includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets.

(2) Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

(3) Workers, other than part-time workers, who are exempt from notice under § 4 of WARN are nonetheless counted as employees for purposes of determining coverage as an employer.

(4) An employer may have one or more sites of employment under common ownership or control. An example would be a major auto maker which has dozens of automobile plants throughout the country. Each plant

would be considered a site of employment, but there is only one "employer," the auto maker.

(b) *Plant closing.* The term "plant closing" means the permanent or temporary shutdown of a "single site of employment," or one or more "facilities or operating units" within a single site of employment, if the shutdown results in an "employment loss" during *any 30-day period* at the single site of employment for *50 or more* employees, excluding any part-time employees. An employment action that results in the effective cessation of production or the work performed by a unit, even if a few employees remain, is a shutdown. A "temporary shutdown" triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of "employment loss.

(c) *Mass layoff.* (1) The term "mass layoff" means a reduction in force which first, is not the result of a plant closing, and second, results in an employment loss at the single site of employment during *any 30-day period* for:

(i) *at least 33 percent* of the active employees, excluding part-time employees, and

(ii) *at least 50 employees,* excluding part-time employees.

Where 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply, and notice is required if the other criteria are met. Plant closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site. A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site.

(2) Workers, other than part-time workers, who are exempt from notice under § 4 of WARN are nonetheless counted as employees for purposes of determining cover-

age as a plant closing or mass layoff. For example, if an employer closes a temporary project on which 10 permanent and 40 temporary workers are employed, a covered plant closing has occurred although only 10 workers are entitled to notice.

(d) *Representative.* The term "representative" means an exclusive representative of employees within the meaning of § 9(a) or 8(f) of the National Labor Relations Act or § 2 of the Railway Labor Act.

(e) *Affected employees.* The term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. This includes individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The term "affected employees" includes managerial and supervisory employees, but does not include business partners. Consultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not "affected employees" of the business to which they are assigned. In addition, for purposes of determining whether coverage thresholds are met, either incumbent workers in jobs being eliminated or, if known 60 days in advance, the actual employees who suffer an employment loss may be counted.

(f) *Employment loss.* (1) The term "employment loss" means (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.

(2) Where a termination or a layoff (see paragraphs (f)(1)(i) and (ii) of this section) is involved, an em-

ployment loss does not occur when an employee is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination.

(3) An employee is not considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff—

(i) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment, or

(ii) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(4) A "relocation or consolidation" of part or all of an employer's business, for purposes of paragraph § 639.3 (h)(4), means that some definable business, whether customer orders, product lines, or operations, is transferred to a different site of employment and that transfer results in a plant closing or mass layoff.

(g) *Unit of local government.* The term "unit of local government" means any general purpose political subdivision of a State, which has the power to levy taxes and spend funds and which also has general corporate and police powers. When a covered employment site is located in more than one unit of local government, the employer must give notice to the unit to which it determines it directly paid the highest taxes for the year preceding the year for which the determination is made. All local taxes directly paid to the local government should be aggregated for this purpose.

(h) *Part-time employee.* The term "part-time" employee means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required, including workers who work full-time. This term may include workers who would traditionally be understood as "seasonal" employees. The period to be used for calculating whether a worker has worked "an average of fewer than 20 hours per week" is the shorter of the actual time the worker has been employed or the most recent 90 days.

(i) *Single site of employment.* (1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(2) There may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within such a building. For example, an office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be its single site of employment.

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.

(4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a

town and which are managed by a single employer are separate sites if they employ different workers.

(5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

(7) Foreign sites of employment are not covered under WARN. U.S. workers at such sites are counted to determine whether an employer is covered as an employer under § 639.3(a).

(8) The term "single site of employment" may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not acceptable.

(j) *Facility or operating unit.* The term "facility" refers to a building or buildings. The term "operating unit" refers to an organizationally or operationally distinct product, operation, or specifiic work function within or across facilities at the single site.

(k) *State dislocated worker unit.* The term "State dislocated worker unit" means a unit designated or created in each State by the Governor under Title III of the Job Training Partnership Act, as amended by EDWAA.

(l) *State.* For the purpose of WARN, the term "State" includes the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

§ 639.4 Who must give notice?

Section 3(a) of WARN states that "an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order * * * *" Therefore, an employer who is anticipating carrying out a plant closing or mass layoff is required to give notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. (See definitions in § 639.3 of this part.)

(a) It is the responsibility of the employer to decide the most appropriate person within the employer's organization to prepare and deliver the notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. In most instances, this may be the local site plant manager, the local personnel director or a labor relations officer.

(b) An employer who has previously announced and carried out a short-term layoff (6 months or less) which is being extended beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an employment loss from the date of its commencement.

(c) In the case of the sale of part or all of a business, § 2(b)(1) of WARN defines who the "employer" is. The seller is responsible for providing notice of any plant closing or mass layoff which takes place up to and including the effective date (time) of the sale, and the buyer is responsible for providing notice of any plant closing or mass layoff that takes place thereafter. Affected employees are always entitled to notice; at all times the employer is responsible for providing notice.

(1) If the seller is made aware of any definite plans on the part of the buyer to carry out a plant closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as an agent of the buyer, if so empowered. If the seller does not give notice, the buyer is, nevertheless, responsible to give notice. If the seller gives notice as the buyer's agent, the responsibility for notice still remains with the buyer.

(2) It may be prudent for the buyer and seller to determine the impacts of the sale on workers, and to arrange between them for advance notice to be given to affected employees or their representative(s), if a mass layoff or plant closing is planned.

§ 639.5 When must notice be given?

(a) *General rule.* (1) With certain exceptions discussed in paragraphs (b), (c) and (d) of this section and in § 639.9 of this part, notice must be given at least 60 calendar days prior to any planned plant closing or mass layoff, as defined in these regulations. When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement. A worker's last day of employment is considered the date of that worker's layoff. The first and each subsequent group of terminees are entitled to a full 60 days' notice. In order for an employer to decide whether issuing notice is required, the employer should—

(i) Look ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate for any 30-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement; and

(ii) Look ahead 90 days and behind 90 days to determine whether employment actions both taken

and planned each of which separately is not of sufficient size to trigger WARN coverage will, in the aggregate for any 90-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement. An employer is not, however, required under § 3(d) to give notice if the employer demonstrates that the separate employment losses are the result of separate and distinct actions and causes, and are not an attempt to evade the requirements of WARN.

(2) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given. If this "snapshot" of the number of employees employed on that date is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage. Examples of unrepresentative employment levels include cases when the level is near the peak or trough of an employment cycle or when large upward or downward shifts in the number of employees occur around the time notice is to be given. A more representative number may be an average number of employees over a recent period of time or the number of employees on an alternative date which is more representative of normal employment levels. Alternative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances.

(b) *Transfers.* (1) Notice is not required in certain cases involving transfers, as described under the definition of "employment loss" at § 639.3(f) of this part.

(2) An offer of reassignment to a different site of employment should not be deemed to be a "transfer" if the new job constitutes a constructive discharge.

(3) The meaning of the term "reasonable commuting distance" will vary with local and industry conditions. In determining wht is a "reasonable commuting distance",

consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time.

(4) In cases where the transfer is beyond reasonable commuting distance, the employer may become liable for failure to give notice if an offer to transfer is not accepted within 30 days of the offer or of the closing or layoff (whichever is later). Depending upon when the offer of transfer was made by the employer, the normal 60-day notice period may have expired and the plant closing or mass layoff may have occurred. An employer is, therefore, well advised to provide 60-day advance notice as part of the transfer offer.

(c) *Temporary employment.* (1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking.

(2) Employees must clearly understand at the time of hire that their employment is temporary. When such understandings exist will be determined by reference to employment contracts, collective bargaining agreements, or employment practices of an industry or a locality, but the burden of proof will lie with the employer to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings.

(3) Employers in agriculture and construction frequently hire workers for harvesting, processing, or for work on a particular building or project. Such work may be seasonal but recurring. Such work falls under this exemption if the workers understood at the time they were hired that their work was temporary. In uncertain

situations, it may be prudent for employers to clarify temporary work understandings in writing when workers are hired. The same employers may also have permanent employees who work on a variety of jobs and tasks continuously through most of the calendar year. Such employees are not included under this exemption. Giving written notice that a project is temporary will not convert permanent employment into temporary work, making jobs exempt from WARN.

(4) Certain jobs may be related to a specific contract or order. Whether such jobs are temporary depends on whether the contract or order is part of a long-term relationship. For example, an aircraft manufacturer hires workers to produce a standard airplane for the U.S. fleet under a contract with the U.S. Air Force with the expectation that its contract will continue to be renewed during the foreseeable future. The employees of this manufacturer would not be considered temporary.

(d) *Strikes or lockouts.* The statute provides an exemption for strikes and lockouts which are not intended to evade the requirements of the Act. A lockout occurs when, for tactical or defensive reasons during the course of collective bargaining or during a labor dispute, an employer lawfully refuses to utilize some or all of its employees for the performance of available work. A lockout not related to collective bargaining which is intended as a subterfuge to evade the Act does not qualify for this exemption. A plant closing or mass layoff at a site of employment where a strike or lockout is taking place, which occurs for reasons unrelated to a strike or lockout, is not covered by this exemption. An employer need not give notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act. Non-striking employees at the same single site of employment who experience a covered employment loss as a result of a strike are entitled to notice; however, situations in which a strike or lockout affects

non-striking employees at the same plant may constitute an unforeseeable business circumstance, as discussed in § 639.9, and reduced notice may apply. Similarly, the "faltering company" exception, also discussed in § 639.9 may apply in strike situations. Where a union which is on strike represents more than one bargaining unit at the single site, non-strikers includes the non-striking bargaining unit(s). Notice also is due to those workers who are not a part of the bargaining unit(s) which is involved in the labor negotiations that led to the lockout. Employees at other plants which have not been struck, but at which covered plant closings or mass layoffs occur as a direct or indirect result of a strike or lockout are not covered by the strike/lockout exemption. The unforeseeable business circumstances exception to 60 days' notice also may apply to these closings or layoffs at other plants.

§ 639.6 Who must receive notice?

Section 3(a) of WARN provides for notice to each representative of the affected employees as of the time notice is required to be given or, if there is no such representative at that time, to each affected employee. Notice also must be served on the State dislocated worker unit and the chief elected official of the unit of local government within which a closing or layoff is to occur. Section 2(b)(1) of the Act states that "any person who is an employee of the seller (other than a part-time employee) as of the effective date [time] of the sale shall be considered an employee of the purchaser immediately after the effective date [time] of the sale." This provision preserves the notice rights of the employees of a business that has been sold, but creates no other employment rights. Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss.

(a) *Representative(s) of affected employees.* Written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local union(s) representing affected employees, it is recommended that a copy also be given to the local union official(s).

(b) *Affected employees.* Notice is required to be given to employees who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such workers can be identified at the time notice is required to be given. If, at the time notice is required to be given, the employer cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, the employer must provide notice to the incumbent in that position. While part-time employees are not counted in determining whether plant closing or mass layoff thresholds are reached, such workers are due notice.

(c) *State dislocated worker unit.* Notice is to be served upon the State dislocated worker unit. Since the States are restructuring to implement training under EDWAA, service of notice upon the State Governor constitutes service upon the State dislocated worker until such time as the Governor makes public State procedures for serving notice to this unit.

DOL: FINAL INTERPRETATIVE RULE AND SUPPLEMENTARY INFORMATION ON IMPLEMENTING WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

Following is the text of the Department of Labor's final interpretative rule and supplementary information on the Worker Adjustment and Retraining Notification Act (WARN).

The rule was published April 20, 1989 (54 FR 16042) and took effect May 22, 1989.

SUPPLEMENTAL INFORMATION:

Introduction

The Worker Adjustment and Retraining Notification Act (WARN, the statute, or the Act), Pub. L. 100-379, 102 Stat. 890, was enacted on August 4, 1988. 29 U.S.C. 2101 et seq. Section 11 of the Act provides that WARN goes into effect on February 4, 1989. WARN provides that, with certain exceptions, employers of 100 or more workers must give at least 60 days' advance notice of a plant closing or mass layoff to affected workers or their representatives, to the State dislocated worker unit (see 29 U.S.C. 1661(b)(2)), and to the appropriate local governments. 29 U.S.C. 2902 and 2903. Section 8(a) of the Act requires that the Secretary of Labor "prescribe such regulations as may be necessary to carry out this Act. Such regulations shall, at a minimum, include interpretative regulations describing the method by which employers may provide for appropriate service of notice as required by this Act." 29 U.S.C. 2107(a). Under section 11 of the Act, the authority to issue regulations for WARN became effective on August 4, 1988.

The Employment and Training Administration (ETA) of the Department of Labor (DOL or Department), since the enactment of WARN, has published in the Federal Register for comment various notices, a discussion paper,

an interim interpretative rule and a proposed rule on WARN. 53 FR 34844 (September 8, 1988); 53 FR 36056 (September 16, 1988); 53 FR 38026 (September 29, 1988); 53 FR 39403 (October 6, 1988); 53 FR 43731 (October 28, 1988); 53 FR 48884 (December 2, 1988); and 53 FR 49076 (December 5, 1988). After full consideration of public comments received in response to the notices, discussion paper, interim interpretative rule and proposed rule, ETA is publishing this final rule.

Prior Actions

On September 16, 1988, the Department published a notice in the Federal Register inviting comments from interested parties regarding: "(1) The extent to which the Department should issue interpretive regulations; and (2) To the extent that regulations are needed, the specific views of commenters on how particular sections of the law should be implemented through regulations."

A total of 63 letters was received from employer associations, companies, law firms, unions, employee associations, Members of Congress, State officials, and a private citizen. Commenters strongly encouraged DOL to publish regulations to explain how WARN would be implemented and to clarify WARN provisions they found ambiguous. Commenters also requested that DOL address a number of specific items and define particular terms.

On October 28, 1988, the Department published the WARN Discussion Paper in the Federal Register and solicited comments. This paper reviewed sections 2, 3, 4, and 11 of the statute, discussing questions raised in comments on the September 16, 1988 Notice and issues addressed in the legislative history.

DOL received 62 comment letters in response to the October 28 Discussion Paper from employer associations, employers, labor unions, law firms, a State governmental agency, four members of Congress who were legislative

sponsors, and another member of Congress. Commenters generally expressed agreement with the scope of the issues presented and many of the tentative positions covered in the Discussion Paper. Commenters did raise specific points of disagreement, posed additional questions, sought information about the application of WARN in specific situations, and provided examples.

On December 2, 1988 and December 5, 1988, the Department published an interim interpretative rule effective through April 1, 1989, and a proposed rule, respectively, implementing the provisions of WARN and soliciting comments (these documents will be referred to as the proposed rule or regulation). 53 FR 48884 and 53 FR 49076. The rules were identical. In their preambles, the Department discussed issues under the Act and comments received in response to the October 28, 1988 Discussion Paper. DOL received 82 letters of comment on the interim interpretative and proposed rules from employer associations, employers, labor unions, City governments, government interest groups, professional associations, four members of Congress who were legislative sponsors, a municipal utility and a Federal agency. The comments were fully considered, along with the written comments on the September 16, 1988 Notice and the October 28, 1988 Discussion Paper, in ETA's development of this final rule. The comments are discussed at considerable length in order to make clear the Department's interpretation of WARN through these final regulations and of their application to some of the problems that may arise in implementing the Act. At various points in this preamble the Department, in response to comments, has provided advice to employers on methods by which WARN liability may be avoided. This advice is for guidance only and should not be interpreted to impose any new or additional standards or requirements on employers.

Analysis of Final Rule and Comments

(1) General Issues

(a) Organization of Regulations

The Department has written and presented the WARN regulations so they will be understandable, and offer guidance to readers in the business and labor communities. Issues are discussed in their logical sequence, in an effort to easily convey the intent of the Act and employers' responsibilities.

(b) Scope and Purpose

These regulations cover sections 2, 3, and 4 of the Worker Adjustment and Retraining Notification Act. Section 2 of the Act provides necessary definitions and exclusions. Section 3 creates the notice requirement, describes the service of notice, sets forth the legal bases for providing reduced notice, provides for the extension of a layoff period, and specifies the consideration of employment losses over a 90-day period in determining whether some employers are covered by WARN requirements. Section 4 outlines two exemptions to coverage of plant closings and mass layoffs.

(c) General Comments

A commenter suggested that the final regulations should only deal with what WARN requires, not what the Department encourages. In developing these final regulations, DOL has attempted to faithfully follow the language and intent of WARN. The Department also has been aware that some of the provisions of WARN may be ambiguous. In an effort to assist the public in avoiding unintentional non-compliance, DOL has tried to point out potential problems and in some cases has suggested methods of compliance.

A commenter suggested that DOL should not regard the comments of four of the Congressional sponsors, who

commented both on the Discussion Paper and on the proposed regulations, as legislative history and should disregard those comments. The Department agrees that these comments do not have the force of legislative history. On the other hand, there is no reason to disregard them. They have been treated as any other comments.

A commenter suggested that the final regulations should contain specific citations to the legislative history for clarity and to preclude litigation. DOL agrees that citations may be useful and has provided them.

(f) Section 639.3(f) Definition of "Employment Loss"

This section defines "employment loss" and exclusions from employment loss when certain transfers occur. These definitions closely follow the language of the statute. The proposed regulation provided that workers who retained "full employment status" could be reassigned without suffering employment loss. The Department notes that it interprets the statutory terms "termination" and "layoff" in section 3(a)(6) to be distinguishable and to have their common sense meanings. Thus, for the purposes of defining "employment loss", the term "termination" means the permanent cessation of the employment relationship and the term "layoff" means the temporary cessation of that relationship.

A number of commenters questioned the use of the term "full employment status" in section 639.3(f)(2). They argued that this concept, if broadly applied to mean that an employee can be reassigned only if he/she retains full pay and benefits, is inconsistent with the statutory definition of employment loss and with employers' rights to reassign workers.

The intent of the "full employment status" language was to deal with a specific comment from a major employer which has a program for moving workers who are to be terminated or laid off for a long time into job-finding or retraining activities, all at full pay and benefits. The

"full employment status" language was an attempt to distinguish this kind of program, in which an employee is not working at his old job but is retained on the payroll, and does not experience an employment loss, from other kinds of severance pay or supplemental unemployment benefits (SUB) programs which occur after the end of the job and do not postpone the date of the employment loss. DOL recognizes that the comments have merit and that the "full employment status" concept is capable of overbroad application. The regulations have been revised to delete the concept but to retain language encouraging the kinds of employer-sponsored retraining programs for which the full employment status concept was developed.

It must be noted that the ability to reassign workers is not without limits. An employer may not vary the terms of a worker's assignment so much as to constructively discharge (as discussed in greater detail below) the employee. Language to this effect has been added to the regulation.

The question also has been raised as to whether an employment loss occurs if an employee retains full pay and benefits and other entitlements but is not required to report to work. DOL notes that neither WARN nor the regulations dictate the nature of work to be performed—or whether work must be performed—during a period of employment after notice of an impending plant closing or mass layoff has been given. However, WARN does not replace or alter any other contractual or statutory rights and remedies of employees, and other contracts or statutes may be applicable when employers consider reassignments or assignment to non-work status after giving notice in advance of plant closings or mass layoffs.

Several commenters requested further definition of what constitutes a "voluntary departure, or retirement", which are excluded from the definition of employment loss. One

commenter suggested that "incentive programs" should be specifically recognized as voluntary departures. Another commenter suggested that employees who are offered transfers to another employemnt site and who refuse those offers should be considered to have voluntarily quit. Other commenters suggested that "voluntary layoffs", that is, layoffs provided for in certain collective bargaining agreements under which more senior workers may accept a layoff in return for certain SUB or other benefits should be excluded from the definition of employment loss. Other commenters disagreed and suggested that workers who retire or quit in the face of an impending termination should not be treated as having voluntarily departed.

DOL agrees with the commenters that some clarification of the concept of voluntary departures is appropriate. The concept is not a new one in the law; there is a developed body of law under such statutes as the NLRA, Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act. This body of law recognizes the concept of constructive discharge, under which a worker's resignation or retirement may be found not to be voluntary if the employer has created a hostile or intolerable work environment or has applied other forms of pressure or coercion which forced the employee to quit or resign. Similarly, acceptance of incentive programs, particularly incentive retirement programs, can be found to be involuntary where a worker was unduly pressured to accept the program. The regulations have been revised to include this concept. Since the law in this area is well developed, the regulations do not attempt to specifically define the parameters of voluntariness, but merely refer to the existing legal concepts.

In terms of the specific issues raised in the comments, the Department agrees that incentive programs, including incentive retirement programs and voluntary layoffs, that meet the definition of voluntariness outlined above, are voluntary departures for purposes of WARN. DOL does

not, however, agree that a worker who, after the announcement of a plant closing or mass layoff, decides to leave early has necessarily been constructively discharged or quit "involuntarily". (In the situation posted, where the plant closing or mass layoff has been announced, and, presumably, notice has been given, the worker already has received the notice that WARN requires and whether his later resignation or retirement is voluntary or not is no longer germane.)

The comment about workers who quit when offered a transfer involves another provision of WARN (section 2(b)(2)) which defines exclusions from employment loss. Under that section, which will be discussed in greater detail below, the basic rule is that if, as a part of a relocation or consolidation of all or part of an employer's business, a worker is offered a transfer within a reasonable commuting distance, the worker is not considered to have suffered an employment loss whether or not the worker declines the transfer. There is no requirement for acceptance of the offer in this situation and, unless the offer itself may be deemed to be a constructive discharge, the offer of the transfer itself means that the worker is not deemed to suffer an employment loss. On the other hand, if the transfer is beyond a reasonable commuting distance, WARN requires that the employee accept the transfer and refusal to accept means that the employee has suffered an employment loss. If the transfer is not covered under these provisions, because not offered as a result of a relocation or consolidation, a technical employment loss occurs. If an employer offers to transfer a worker in this situation and if the worker accepts, the employer may still wish to provide notice as additional protection from liability.

Several commenters suggested that the regulations incorporate a concept of "net employment loss" to cover situations in which an employer lays off one group of workers and simultaneously hires another group to work on a different aspect of the same task or project. Other

commenters suggested that the definition of employment loss exclude government service contractors; since when such employers lose their contracts, their employees ordinarily are hired by the successor contractor. Similarly, a commenter suggested that where work is contracted out and the contractor hires the former employer's old workers to perform the contracted work, no notice should be required unless more than the threshold number of employees are not rehired. These definitions cannot be squared with the definition of employment loss or with the statutory structure, which focuses on the effects of employment losses on groups of workers. WARN requires notice to workers who lose their jobs with a particular employer, whether or not other workers have gained other jobs and whether or not other employers may hire those workers.

As noted above, Sec. 639.3(f)(4) reiterates the statutory exclusion of certain transfers from the definition of employment loss. Commenters suggested that further definition of the terms "relocation" and "consolidation" are needed. One commenter suggested that the definition should be consistent with the definition under the NLRA; which it summarized as stating that the terms should be given a broad meaning not dependent on labels, as long as the transfer offer is bona fide and is to a related enterprise. While the Department agrees that a broad definition of the terms is appropriate in light of the intent of WARN to focus on actual losses of employment, the commenter's proposal cannot be accepted since it would give no meaning to the words "relocation or consolidation". The final regulations have been revised to include a broad definition, suggested by another commenter, under which the transfer of definable business, whether customer orders, product lines or operations, to a different site will be considered a relocation or consolidation.

(c) Section 693.3(c) Sales of Businesses

WARN creates an absolute division of responsibility for giving notice between a buyer and a seller of a business; the seller is liable to give notice of covered actions which occur up to and including the date (time) of sale and the buyer is responsible thereafter. Thus, at all times one of the parties to the transaction is responsible for giving notice. The proposed regulations offered guidance to employers anticipating a sale or purchase transaction to avoid confusion regarding service of notice and liability under WARN, by suggesting that each party's responsibility with respect to these items be covered in the contract of sale.

There were a wide variety of comments on this provision. One commenter suggested that the regulations make it clear that if the employees of a business that has been sold are not rehired by the buyer, the responsibility for giving notice is on the seller. The Department believes that such an allocation of responsibility is precisely contrary to the statutory language and intent. If a plant closing occurred as a result of the buyer's decision not to rehire the seller's workers, and the closing occurred after the effective time of the sale, the buyer is responsible for giving notice. This view is consistent with the statutory provision that the employees of the seller become the employees of the buyer immediately after the sale, with the intent of WARN that notice be given to workers who will suffer dislocations and with the reality of allocating responsibility for notice to the party to the transaction that actually makes the decision to order the plant closing or mass layoff. Other commenters agreed with the allocation of notice responsibility just discussed; one suggested that the apportionment of liability turn solely on when the plant closing or mass layoff occurs relative to the effective date of the sale.

Some commenters suggested that the regulations be clarified to assign responsibility to the seller through the

date of sale and to the buyer on the next day. Such an interpretation is a possible reading of the statutory language; but DOL has rejected that reading because it would either make the seller responsible for the acts of the buyer or it would create a period in which no one is responsible for giving notice. The former alternative is inconsistent with the legal position of the parties after the sale has become effective. The latter alternative is inconsistent with the intent of the statute.

A commenter suggested that the regulations make it clear that the seller is not responsible for a layoff ordered by the buyer within 60 days of the sale. For the reasons already discussed, DOL agrees that no such responsibility attaches.

Several commenters suggested that no employment loss is experienced in a sale situation if the seller's employees are hired by the buyer within 6 months of the sale. Assuming there has been an announcement that a layoff of 6 months or less has been ordered, this is a correct statement since the definition of employment loss excludes layoffs of 6 months or less.

Several commenters discussed the provision of WARN that assigns the seller's employees to the buyer after the sale. These commenters agreed that this provision does not create any additional employment rights, other than WARN notice rights and that, although a technical termination (i.e., the termination of employment with the seller) may be deemed to have occurred in a sale, that termination, by itself, is not a basis for WARN notice. One commenter suggested that nothing in the WARN provision on sales requires that a buyer actually hire the seller's employees. Another commenter suggested that it should be made clear that employees in a sale situation have the same WARN rights as do any other workers. The Department generally agrees with all these statements and believes the final regulations reflect them;

but notes that the buyer is responsible for giving notice to workers if it does not hire them.

One commenter suggested that the regulation should focus on the closing date and time of the sale, not on the effective date and time. The Department does not view these terms as different and the final regulations continue to use the term "effective date" because it is used in the Act.

One commenter suggested that the phrase "at all times, one of the parties to the transaction is responsible for giving notice" be added to the regulations. DOL agrees and has added the phrase in the final regulations.

The variety of comments suggests that regulations needed to be clarified, along the lines suggested in this discussion. This section has been revised extensively. The examples in Sec. 639.4(c)(1)-(3) have been revised to make it clear that these are merely suggestions about how the buyer and seller may wish to handle notice responsibilities between themselves and do not change the basic allocation of responsibility for notice. While specific mention of the contract of sale has been deleted in the final regulations, since the parties to a transaction may utilize other methods to allocate WARN responsibility, DOL continues to suggest that prudent employers make provisions for WARN notice, if applicable, in the contract of sale or elsewhere. The federal regulations also make it clear that if the seller gives notice as the buyer's agent, the responsibility for giving notice still remains with the buyer.

The FHLBB also described the situation in which it takes over an institution and keeps it operating while seeking to merge it with another bank or to find new owners. In that case, the new owner stands in the position of a buyer under WARN and is responsible for notice from the time the merger or acquisition becomes effective.

One commenter suggested that DOL not promulgate regulations on sales. DOL believes that such a course of action would be inconsistent with its statutory role and with its efforts to assist employers and workers in fully understanding their rights and obligations under a complex statute.